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No. 11,832

IN THE
United States Court of Appeals
For the Ninth Circuit

CHESTER WALKER COLGROVE, Trading and
Doing Business Under the Firm Name
of Colusa Remedy Company, and COLUSA
REMEDY COMPANY (a corporation),

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' PETITION FOR A REHEARING.

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PAUL P. O'BRIEN,

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APPELLANTS' PETITION FOR A REHEARING.

*To the Honorable William Denman, Chief Judge, and
to Honorable Associate Judges Healy and Stephens
of the United States Court of Appeals for the Ninth
Circuit:*

Comes now Chester Walker Colgrove, trading and
doing business under the firm name of Colusa Remedy
Company, and Colusa Remedy Company, a corporation,
appellants, and respectfully petition for a rehearing of
the judgment and decision entered and filed herein on
August 8, 1949, and as grounds therefor respectfully set
forth as follows:

I—THE COURT IN ITS OPINION ERRED IN INFERENTIALLY HOLDING THAT THE EVIDENCE WAS SUFFICIENT TO JUSTIFY THE FINDING AND JUDGMENT OF THE COURT BELOW HOLDING THE DEFENDANTS GUILTY OF CRIMINAL CONTEMPT.

There was a complete failure of proof of any criminal contempt:

(a) There was absolutely no proof that the “directions for use” on the Colusa labels were not adequate.

(b) There was absolutely no proof that the defendants knew these labels to be inadequate.

(c) There was no evidence of any “wilful” disobedience, an indispensable ingredient of criminal contempt.

II—THERE WAS NO SUFFICIENT PLEADING OF ANY CRIMINAL CONTEMPT; THE COURT FAILED IN ITS OPINION TO PASS ON THIS VITAL ISSUE.

III—THE INJUNCTIVE ORDER WAS SO VAGUE AND INDEFINITE AS NOT TO BE THE BASIS OF A CONTEMPT ORDER AND THEREFORE VIOLATED THE FIFTH AND SIXTH AMENDMENTS TO THE U. S. CONSTITUTION.

IV—THE CIRCUIT COURT ERRED IN CONSIDERING MATTERS NOT BEFORE THE TRIAL COURT OR PROPERLY BEFORE THIS COURT.

V—THE COURT FAILED TO RULE ON THE QUESTION OF WHETHER UNDER THE CIRCUMSTANCES OF THIS CASE THERE COULD BE BUT A SINGLE CONTEMPT.

VI—THE COURT BELOW WAS WITHOUT JURISDICTION TO FIND APPELLANTS GUILTY OF CRIMINAL CONTEMPT SINCE NEWSPAPER ADVERTISING, WHICH

FORMED THE BASIS OF THE ALLEGED CONTEMPT, IS EXCLUSIVELY IN THE JURISDICTION OF THE FEDERAL TRADE COMMISSION, AND NOT THE PURE FOOD AND DRUG ACT UNDER WHICH THIS INJUNCTIVE ORDER WAS ISSUED. THIS COURT SHOULD EXPRESSLY PASS UPON THIS SUBJECT.

VII—THE COURT ERRED IN NOT DISCUSSING OR PASSING UPON IN ITS DECISION ALL OTHER IMPORTANT POINTS RAISED ON OUR ORIGINAL APPEAL AND WHICH WE REURGE HERE BY REFERENCE.

INTRODUCTION.

The writers of this petition for a rehearing who appear as of counsel, were not participants until after this court had handed down its decision.

It is only because all counsel feel that there has been a real miscarriage of justice in this instance, and that the case is one which should receive the further consideration of this court, that we have prepared this petition for a rehearing. We most respectfully ask the court to give this petition the same consideration we have given in its preparation.

It is respectfully submitted that a rehearing should be granted, and the judgment below reversed because there was neither a valid pleading nor any proof of a criminal contempt.

THE FACTS AS TO THIS CONTROVERSY.

Before elaborating upon the various legal propositions stated in this petition, we desire briefly to advert to the salient facts in this matter as indisputably shown by the record below:

This entire controversy, with its most severe judgment below, arises out of the simple fact that appellants did not print *on the Colusa labels* the names of certain skin ailments (poison oak, itch, etc.) which were incidentally mentioned in the fine print in the Colusa newspaper advertisements (in quoting from testimonials). We understand from what the government's attorney said (Record p. 53) that he concedes that had these ailments been thus named, the Colusa labels would have been beyond criticism, and not in violation of the injunction below. This very concession, in our humble opinion, completely destroys the government's case and wholly negatives any possibility of a *criminal* contempt! By this concession the government in effect admits that the "directions for use" on the Colusa labels were entirely adequate (which is one of the vital factual issues in this case) since the placing of these names of diseases on the label would not make the directions any different or more adequate.

The second salient aspect of the facts below which we desire to stress, at the outset, is that the lower court's injunction was and is a quite general and indefinite order, and therefore is violative of the Fifth and Sixth Amendments to the U. S. Constitution. It does not spell out any exact or definite standards to guide appellants in their attempt to conform to it. Its wording is admittedly awkward and misleading, so much so that the lower court had to concede:

“The Court. The defendant is technically, literally correct in the literal meaning of the restraining order * * *” (R. 77).

“The Court. I think the injunction should, possibly, have been worded in the disjunctive instead of the conjunctive.” (R. 78).

The court then proceeded to find appellants guilty of *criminal contempt* for having obeyed the letter but *not* the spirit of this indefinite and confusing injunction, and proceeded to impose a most severe judgment.

We can think of no better description of this example of judicial wrath than the recent apt statement of Justice Frankfurter in a dissenting opinion in a *civil* contempt case based on a similarly indefinite decree:

“But courts should be explicit and precise in their commands and should only then be strict in exacting compliance. To be both strict and indefinite is a *kind of judicial tyranny*.”¹ (*McComb v. Jacksonville Paper Co.*, February 14, 1949, 93 Law Ed. Advance Opinions, 457, at 462).

I. THE COURT IN ITS OPINION ERRED IN INFERENTIALLY HOLDING THAT THE EVIDENCE WAS SUFFICIENT TO JUSTIFY THE FINDING AND JUDGMENT OF THE COURT BELOW HOLDING THE DEFENDANTS GUILTY OF CRIMINAL CONTEMPT.

(1) The controlling law.

This is a criminal contempt proceeding. The legal principles governing it are strict and well settled:

¹Unless otherwise indicated, all emphasis herein, by italics or otherwise, is ours.

“In a proceeding for criminal contempt, the presumption of innocence must be applied. The burden is on the government to prove the guilt of the defendants beyond a reasonable doubt. There is no shifting of the burden of proof. The defendants cannot be compelled to testify against themselves. *Gompers v. Buck's Stove & Range Co.*, 211 U.S. 418, 444, 31 S. Ct. 492, 55 L. Ed. 797, 34 L.R.A., N.S. 874.” (*U. S. v. Balaban*, 26 Fed. Sup. 491, 498.)

“In a contempt proceeding, the government must prove all the essential elements of the offense and guilt beyond a reasonable doubt.”

United States v. Resnick, 299 U.S. 207;

Holt v. United States, 218 U.S. 245;

Agnes v. United States, 165 U.S. 36;

Alberte v. United States, 159 F. (2d) 278;

United States v. United Mine Workers, 330 U.S. 258;

Penfield v. Securities and Exchange Commission, 330 U.S. 585;

McComb v. Jacksonville Paper Co., 93 L. Ed. 457.

The following is a succinct summary of the settled law by Judge Stephens in *Raskin v. Superior Court*, 138 Cal. App. 668, 33 P. (2d) 35, 36:

“Contempt is a disobedience of court by acting in opposition to its authority, justice or dignity, and is an offense of a criminal nature which must be supported as other criminal charges are supported and which is subject to the same presumptions.”

(2) The proof required herein.

As we read the court's opinion, the crux of the decision seems to be that various skin ailments mentioned in the

advertisements were not included among the four ailments mentioned on the label. Such was not the gravamen of the charge. Leaving aside the contention as to whether the wording of both injunctions was susceptible of the restricted construction placed thereon by appellants, we submit that no other conclusion can be arrived at but one establishing the innocence of appellants of the various charges contained in the information.

Assuming that the ailments named on the label constituted a prescribing, recommending and suggesting of the use of the product for such ailments, and further assuming that the other skin ailments mentioned in the advertising likewise constituted a prescribing, recommending and suggesting of the use of such product for such additional ailments, we are confronted with no different situation than if such additional ailments had been included in and set forth on the label.

If all of these ailments appeared upon the label, then the sole question to be determined was whether the directions in the one instance were specific or in the other instance adequate for the use of the product for such ailments.

The burden of proof as to the inadequacy of such directions at all times was upon the Government. *No evidence was introduced that the directions were neither specific nor adequate for the treatment of all ailments named on the label or referred to in the advertisements.* The absence of such proof constituted a failure to prove any or all of the alleged contempts.

Neither injunction directed that all ailments for which the product was prescribed, suggested or recommended should appear upon the label. The injunctions merely provided that the label should contain specific or adequate directions for its use in the treatment of any ailment for which it was prescribed, recommended and suggested. If the use of the testimonials in the advertisements constituted such prescribing, recommending or suggesting, then the injunctions were fully complied with because the directions were specific and adequate as to the use of the product.

This court can, as the lower court should have done, take judicial knowledge of the fact that the common and accepted means of applying lotions, unguents and ointments is by external application either by hand or by the means of an applicator. However, the burden was not upon appellant to establish that the directions were either specific or adequate for any of the named ailments; this burden was upon the Government and no evidence having been introduced to support this vital element of the Government's charges and the presumption of innocence running in favor of appellant, it should be held that appellant is innocent of the charges.

Lastly, on this point, let us assume that all of the ailments set forth in the advertisements were added to those set forth on the label and that the directions appearing on the label followed such designation of ailments. Under these circumstances, would an order adjudging appellant to be in contempt find support in the mere offering in evidence of the label? Would there not have to be, in

addition to such label, evidence produced by the Government showing that the directions were inadequate? Clearly, the answer to both questions should be plain. The mere introduction of the label would not support the charges contained in the information. The failure of the Government to introduce evidence as to the inadequacy of the directions would constitute a fatal failure of proof.*

The contempt charged below consisted of an alleged failure of appellants to place on the Colusa labels "specific" or "adequate" directions for use of Colusa Oil in *all* the diseases for which it is "prescribed" etc., *in the advertising material of appellants*. In other words, the injunction forbade the shipment in interstate commerce of this Colusa Oil:

"* * * without a label containing adequate directions for the use of such product in the treatment of all * * * diseases for which such product is prescribed, recommended and suggested *in the advertising material* * * * of the defendants * * *" (R. 3).

Now, it indisputably appears in the record below (in fact—in the very criminal information filed by the government to initiate these contempt proceedings) that:

(1) These Colusa shipments *all bore labels*.

*In arguing the insufficiency of the evidence, we are aware of the stipulation as to facts that was introduced in the lower court. In our opinion this stipulation went no further than relieving the Government from the proof of certain physical facts, such as activities in interstate commerce, defendant's responsibility for the advertisements, etc. The stipulation did not cover ultimate facts that would establish the guilt of defendant as this would be contrary to his plea of not guilty. It was defendant's contention that the labels complied with the injunction (Record 49).

(2) These labels contained “*directions for use.*”

Therefore, it was incumbent upon the government to prove by competent evidence and beyond any reasonable doubt:

(a) That these “directions for use” were *not* adequate for the treatment of the diseases for which Colusa oil was “prescribed”, etc. in the advertising material of appellants;

and

(b) That appellants *knew* that these “directions for use” were not adequate.

Criminal contempt requires, of course, proof of a deliberate, that is, a *willful disobedience* of the court’s order below. An innocent violation of such decree (due, for example, to a misunderstanding thereof, or otherwise) would not constitute *criminal* contempt. The federal statute on contempt expressly requires this:

“Section 386. *Contempts: When constituting also criminal contempt.* Any person who shall *willfully disobey* any lawful writ, etc.”

Title 18 U.S.C.A., Section 386.

The United States Supreme Court has very clearly defined the significance of the word “willful” in such a criminal statute:

“We recently pointed out that ‘willful’ is a word ‘of many meanings, its construction often being influenced by its context.’ * * * But ‘when used in a criminal statute it generally means an act done with a bad purpose.’ Id. 290 U.S. 394, 78 L. Ed. 384, 54 S. Ct. 223. And see *Felton v. United States*, 96 U.S. 699, 24 L. Ed. 875; *Potter v. United States*, 155 U.S.

438, 39 L. Ed. 214, 15 S. Ct. 144; *Spurr v. United States*, 174 U. S. 728, 43 L. Ed. 1150, 19 S. Ct. 812; *Hargrove v. United States* (C.C.A. 5th), 67 F. (2d) 820, 90 A.L.R. 1276. In that event something more is required than the doing of the act proscribed by the statute. Cf. *United States v. Balint*, 258 U.S. 250, 66 L. Ed. 604, 42 S. Ct. 301. An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime. *Spurr v. United States*, supra (174 U.S. 734, 43 L. Ed. 1152, 19 S. Ct. 812); *United States v. Murdock*, supra (290 U.S. 395, 78 L. Ed. 385, 54 S. Ct. 223).''

Screws v. United States, 325 U.S. 91, 161.

(3) Was such proof adduced below?

It was not. The government made no effort to prove *either* of the aforementioned basic elements. It neither established that these "directions for use" were inadequate; nor did it undertake to show that the appellants *knew* them to be inadequate.

Furthermore, not only does the record contain no proof of the inadequacy of these "directions for use" but, to the contrary, the government in effect conceded below that these "directions for use" *were entirely adequate* insofar as the diseases named on the Colusa label are concerned (i.e., psoriasis, eczema, leg ulcers, athlete's foot). As stated above, these particular diseases are the most severe and difficult skin diseases. The other skin ailments (i.e., poison oak, itch, bed sores, etc.) as to which the whole complaint in this case arises, are admittedly relatively minor skin diseases, and to a large degree are but minor manifestations of some of the aforementioned seri-

ous diseases. It would seem quite evident that "directions for use" which are adequate for the aforementioned severe skin diseases, would likewise be entirely adequate in the treatment of these milder and less difficult ailments. Particularly so when it is realized that this oil is applied in exactly the same way in the treatment of all skin ailments (i.e. as directed in these "directions for use").

However, irrespective of whether the record below affirmatively shows that these "directions for use" *are adequate*, the indisputable fact is that *no* proof or showing was made that they were or are *not* adequate. Hence, a vital and indispensable link in the government's case is missing and since the Government conceded that merely by adding the names of the minor skin afflictions to the bottle would have been sufficient compliance, it conceded in effect that the directions were adequate.

So important and essential is this phase, that we beg indulgence to restate it in a somewhat different form. To prove a contempt below, it was incumbent upon the government to establish (beyond any reasonable doubt) the following four salient facts:

Fact (1)—That Colusa Oil was shipped in interstate commerce.

Fact (2)—That in its advertising matter the Colusa Company *prescribed*, recommended and suggested the use of this oil for treatment of certain diseases.

Fact (3)—That the "directions for use" on the label were not "adequate" for use of the oil in the diseases for which it is recommended "in the advertising material" of Colusa.

Fact (4)—That appellants knew these “directions for use” to be inadequate.

A large part of the opinion of this Honorable Court is devoted to a discussion of the point as to whether it can be fairly stated that appellants, in their advertising matter, did “*prescribe, recommend and suggest*” the use of this oil in the treatment of poison oak and the other diseases mentioned in fine print in the testimonials (in the newspaper ads) but not named on either the heading of these advertisements or on the bottle label. We believe that the court’s conclusion that this purely incidental mention of these diseases in the testimonials constituted a “*prescribing*” of this oil for these diseases is subject to serious legal and judicial question. Even the lower court recognized this:

“The defendant is * * * literally correct in the literal reading of the restraining order * * *” (R. 77).

However, we are not now concerned with this phase (relating to Fact (2) above). Assuming for the sake of argument the soundness of the conclusion of this Honorable Court that appellants did “*prescribe, etc.*” Colusa oil for poison oak, etc. (i.e. Fact (2) above), the fact still remains that the record below is completely devoid of *any* proof that the “directions for use” were *not* adequate, or appellants *knew* them to be inadequate.

Moreover, insofar as any proof of appellants’ intent or knowledge (i.e. *deliberate or willful violation of the injunction*) is concerned, not only is there *no such proof* but, to the contrary, the undisputed testimony below shows

a sincere and good faith effort on the part of appellants to comply with the rather vague and general writ below. That unrefuted evidence shows (R. 63), without dispute, that immediately after the issuance of this injunction, the defendants, in a conscientious and diligent effort to comply with this order:

(1) Suspended all *intrastate* as well as interstate shipments of Colusa oil (even though the lower Court had, and attempted, no jurisdiction whatsoever over the *intrastate* shipments).

(2) Printed new labels at substantial expense.

(3) Recalled previous shipments of Colusa oil from various states, for re-labelling, even though defendants could have proceeded freely to sell and distribute these pre-injunction shipments in such states, with impunity insofar as this injunction was concerned.

This testimony stands wholly undisputed and unrefuted.

Furthermore, the defendants expressly disclaimed, in the sworn testimony below, any intent to violate this injunction. Mr. Colgrove testified:

“Q. There was no intent on your part at any time to violate this injunction?

A. Positively not.

Q. You did everything you felt that was in your power towards complying with it?

A. I did.” (R. 63.)

And, in connection with this phase as to the “good” or “bad” faith of appellants, we desire to stress the following: The record below plainly shows that appellants *did not believe or understand* that they were “prescribing”

this oil for the several ailments (poison oak, itch, etc.) incidentally mentioned in fine print in the advertisements.

Mr. Colgrove's unrefuted testimony shows that he did not think or understand that such an incidental reference to these diseases constituted a "prescribing" etc. And, as stated above, the lower court agreed that he was literally correct in his reading and interpretation of this injunction.

This being true, it is clear, we respectfully submit, that not only is there an entire absence of proof of "guilty knowledge" or "bad motive" *but the record affirmatively shows at the very most a misunderstanding by the defendants of the scope and effect of this rather ambiguous writ below.* This negatives any criminal contempt.

In other words, even assuming that Mr. Colgrove was wrong (as this Honorable Court says he was) in thinking that he was not *prescribing* for poison oak and these other minor ailments, *still he was acting under a misconception of this order.* Such a misconception, as testified to by him in the lower court (and recognized by the trial court as "literally correct") certainly negatives any "criminal intent" or *deliberate flaunting* of the court's order.

For all of the reasons above reviewed, it is clear, we respectfully submit, that there was no sufficient proof of any *criminal* contempt.

II. THERE WAS NO SUFFICIENT PLEADING OF ANY CRIMINAL CONTEMPT; THE COURT FAILED IN ITS OPINION TO PASS ON THIS VITAL ISSUE.

It is requisite that the information in criminal contempt proceedings contain clear and adequate allegations of all necessary facts, sufficient to show the commission of a criminal contempt including an allegation of wilfulness. *U. S. v. Aberback*, 165 F. (2d) 713; *U. S. v. United Mine Workers of America*, 330 U. S. 258.

It is a cardinal principle of criminal pleading that an indictment or information must allege the facts of the alleged offense *with precision and certainty*, and that vague and indefinite allegations will not suffice. The following text statement epitomizes the many judicial expressions of the aforementioned legal principle, viz.:

“Every material fact and essential ingredient of the offense—every essential element of the offense—must be alleged with precision and certainty, or, as has been stated, every fact which is an element in a *prima facie* case of guilt must be stated in the indictment * * * The offense and the essential elements thereof must be alleged in positive terms, and not by way of recital or mere legal conclusions, unaided by intendment or inference.” (27 American Jurisprudence, p. 621, Sec. 54).

The following are a few of the many cases exemplifying this settled legal principle, viz.:

United States v. United Mine Workers, 330 U. S. 258;

U. S. v. Hess, 124 U.S. 483, 8 S. Ct. 571, 31 L. Ed. 516;

White v. U. S. (C.C.A. Okl. 1933) 67 F. 2d 71;
Jarl v. U. S. (C.C.A. Neb. 1927) 19 F. 2d 891;
Clary v. Commonwealth, 163 Ky. 48, 173 S.W. 171;
Merwin v. People, 26 Mich. 298, 12 Am. Rep. 314;
Collins v. U. S., 253 Fed. 609 (C.C.A. 9);
U. S. v. Morse, 287 Fed. 906;
Harris v. U. S. (C.C.A. Mo.) 104 F. 2d 41;
 See Rule 42b, *Rules of Criminal Procedure*.

In most of these cases, the upper court reversed a conviction, after trial below, because of the insufficiency of the indictment or information.

In *U. S. v. Hess* (supra) an indictment charging a scheme was held insufficient, as vague and uncertain, because it failed to specify the particulars of the scheme. The Supreme Court stated therein:

“No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment, or implication, and the charges must be made directly, and not inferentially, or by way of recital.” (124 U.S. 486)

In *White v. U. S.* (supra) an indictment under the bankruptcy act for concealing assets was held to be insufficient as vague and uncertain because it failed to specify the assets alleged to have been concealed. In thus invalidating the indictment, the court emphasized the settled rule that:

“Every ingredient of which the offense is composed must be accurately and clearly alleged.” (67 F. 2d 73)

In *Collins v. U. S.* (supra) this Honorable Court, in rejecting an indictment as insufficient, stated:

“The indictment charges that the defendant did willfully make and convey false reports and false statements with intent to interfere with the operation and success of the military forces of the United States. But neither the defendant nor the court is advised as to what the reports and statements were, and the allegation is the sheerest conclusion.” (253 Fed. 612)

Application of these settled principles to the information filed in this proceeding.

Applying these settled principles of constitutional law and the rules to the instant case, it is at once apparent, we respectfully submit, that this criminal information was required to contain clear and positive factual allegations showing:

(1) That the “directions for use” (admittedly on the Colusa labels) were not “adequate” in the treatment of the diseases for which Colusa oil was “prescribed” in the advertising material of appellants.

(2) That defendants, at the time they used these labels, *knew* that these “directions for use” were *not* adequate.

Obviously, in such a proceeding, one of the most important phases of such a criminal information would be detailed factual allegations showing wherein or why the “directions for use” are claimed to be inadequate.

There is an entire absence in the Information herein of any such allegations. Neither of said fundamental requisites aforementioned is complied with.

Furthermore, there is not even a general allegation in the Information that defendants “*willfully* disobeyed”

(to borrow the words of the controlling statute) the injunction below.

The only effort to allege a criminal contempt is the following language in Count Three (R. 6) of the Information (which is typical of the language employed in the other counts):

“That the labels on defendants’ product, as shipped to said Schlitz Bros. Drug on July 9, 1947, disregard the requirements of the permanent injunction described in Count I since they fail even to attempt to bear adequate directions for use of the product in the treatment of all ills, conditions and diseases for which the product is prescribed, recommended, and suggested in the advertising material disseminated and sponsored by the defendants.”

It is respectfully submitted that these allegations do not even remotely approach a sufficient pleading of *facts* showing a criminal contempt. At the very most, this allegation is a *pure conclusion of law*.

III. THE INJUNCTIVE ORDER WAS SO VAGUE AND INDEFINITE AS NOT TO BE THE BASIS OF A CONTEMPT ORDER AND THEREFORE VIOLATED THE FIFTH AND SIXTH AMENDMENTS TO THE U. S. CONSTITUTION.

In order for an injunctive order to be valid it must be in no uncertain terms.

Kraus & Bro. v. U. S., 327 U.S. 614 (1946).

Patent omissions could not be omitted by the pleader and supplied by the court.

IV. THE CIRCUIT COURT ERRED IN CONSIDERING MATTERS NOT BEFORE THE TRIAL COURT OR PROPERLY BEFORE THIS COURT.

CONSIDERATION OF MATTERS OUTSIDE THE RECORD.

In the opening paragraph of its opinion, reference is made to alleged court experiences of these appellants. Reference is made to *United States v. 9 bottles of Colusa Natural Oil*, 78 Fed. Supp. 721. We direct attention to the fact that that case has not become final on appeal and a petition is presently being prepared by eastern counsel for *certiorari* to the United States Supreme Court. Such case not being final could not be considered for any purpose. *Estate of Ricks*, 160 Cal. 467; *Tatum v. Levi*, 3 Pac. (2d) 963, 967. For further interest it is to be noted that the case referred to was not a case involving contempt, either civil or criminal but was a libel action and therefore proceeded on rules in admiralty. We submit that the cited case, still undecided by final court action, should have had no place whatsoever in the consideration by this court of the proceedings in that case. The eastern case was a libel action where a libel had been filed for condemnation of a shipment of nine bottles of Colusa oil and the case was governed by rules similar to those in admiralty. Again, the trial court did not have the eastern case nor any of the facts in that case before it in arriving at its finding of contempt, nor could it properly have considered it as proceedings in the court below were for an alleged violation of its order and not any other order, injunction or decree. An Appellate Court is confined to the evidence of the court below on which the adjudication of guilt was made.

Title 28, Section 863, 36 Stat. 1167, followed by Rule 75 Rules of Civil Appeal and Rule 39 Rules of Criminal Appeal.

Marbury v. Madison, 1 Cranch (U.S.) 137, 175,
2 L. Ed. 60;

Estate of Ricks, 160 Cal. 467;

Tatum v. Levi, 3 Pac. (2d) 963, 967.

We believe prior court experiences of these appellants have prejudiced them in the consideration of this appeal and we submit a rehearing should be granted so that they may have this appeal considered exclusively on the issues here involved.

We submit this part of our petition without amplification as we feel that merely to state the point is sufficient.



V. THE COURT FAILED TO RULE ON THE QUESTION OF WHETHER UNDER THE CIRCUMSTANCES OF THIS CASE THERE COULD BE BUT A SINGLE CONTEMPT.

IF THERE WAS CONTEMPT THERE WAS BUT ONE SINGLE CONTEMPT.

In their appeal, appellants urged as error the finding that they were guilty of eight separate criminal contempts and judgment was imposed on them on eight separate counts. This court has failed to pass upon the issue of whether there were eight contempts or only one contempt.

There was one label on all the bottles. The label did not change. The newspaper advertising was all of the same type and character. We submit every publication

did not make it a separate contempt nor does the fact that advertisements were published in different cities make separate contempts. For an analysis of a similar situation, we refer to *People v. Stephens*, 79 Cal. 428. In that case the defendant was charged with libel. On his acquittal there was an attempt to charge him with other libels. The court held that there was but a single offense.

See also

In re Morford, 137 Cal. App. 662, 667;

State v. King (La.), 17 So. 288.

If there was "willful" disobedience, we submit there was but a single order which was disobeyed. We believe the Supreme Court took this view of the United Mine Workers case. Otherwise, there would have been a separate count filed for each day the miners remained out on strike. We cannot agree that this was the Congressional intent.

It is worthy of passing interest to note in the United Mine Workers case that the defendants were charged with "willful" disobedience and evidence was offered to prove the charge.

VI. THE COURT BELOW WAS WITHOUT JURISDICTION TO FIND APPELLANTS GUILTY OF CRIMINAL CONTEMPT SINCE NEWSPAPER ADVERTISING, WHICH FORMED THE BASIS OF THE ALLEGED CONTEMPT, IS EXCLUSIVELY IN THE JURISDICTION OF THE FEDERAL TRADE COMMISSION AND NOT THE PURE FOOD AND DRUG ACT UNDER WHICH THIS INJUNCTIVE ORDER WAS ISSUED. THIS COURT SHOULD EXPRESSLY PASS UPON THIS SUBJECT.

This court failed to pass upon the question specifically in its opinion as to whether newspaper advertising came within the purview of the Pure Food, Drug and Cosmetic Act. If it did not the court below was without jurisdiction to extend its decree to cover *newspaper* advertising. Advertising material that accompanies the package has been held to be within the scope of the Pure Food and Drug Act. *Kordel v. U. S.*, 93 L. Ed. 73, but advertising in newspapers was specifically omitted from the act and left to the Federal Trade Commission. The Solicitor General, in arguing the case of *Kordel v. U. S.*, 93 L. Ed. 74 and *U. S. v. Urbuteit*, 93 L. Ed. 79, stated to that court that newspaper advertising was not within the purview of the Pure Food and Drug Act. This was left to the Federal Trades Commission, Sec. 12 Federal Trades Commission Act Public Law No. 203, 63rd Congress as amended by 52 Stat. 114; U.S.C. 15:42.

Repeated attempts have been made by the Pure Food Administrator to get Congress to extend its scope to newspaper advertising, but Congress has refused to do so.

The trial court, however, construed its injunction to apply to newspaper advertising, not within the scope of the Act. And this court has, erroneously in its opinion, approved of that extention of the trial court's decree.

The appellants, however, had a right to rely on Congress' determination that "advertising" does not include *newspaper* advertising but could legally only refer to such advertising material that accompanied the package or article as in the *Urbuteit* and *Kordel* cases.

The court below and this court therefore erroneously applied its decree beyond the subject matter of its jurisdiction or the jurisdiction of the Food and Drug Administrator, and in conflict with the argument of the Solicitor General in the *Urbuteit* and *Kordel* cases.

In *Kordel v. U. S.*, the Supreme Court said (93 L. Ed. 75):

"A criminal law is not to be read expansively to include what is not plainly within the language of the statute (*U. S. v. Resnick*, 299 U.S. 207, and *Kraus & Bro. v. U. S.*, 327 U.S. 614), since the purpose fairly to apprise men of the boundaries of the prohibited action would then be defeated. *U. S. v. Sullivan*, 332 U.S. 689, 693; *Winters v. Newport*, 333 U.S. 507."

This is a matter of such great importance as to require a rehearing.

VII. THE COURT ERRED IN NOT DISCUSSING OR PASSING UPON IN ITS DECISION ALL OTHER IMPORTANT POINTS RAISED ON OUR ORIGINAL APPEAL AND WHICH WE REURGE HERE BY REFERENCE.

"On appeal no new evidence shall be received in the Supreme Court except in admiralty and prize cases." R. S. 698, March 3, 1911. 36 Stat. 1167.

We submit that consideration of acts of another District Court not before the trial court in considering the innocence or guilt of the defendant constitutes taking new evidence. This is forbidden.

We urge all the other points raised in the appeal in this case to which reference is made and we once again ask their consideration. However, we believe the matters above discussed are sufficient to justify further hearing by this court.

CONCLUSION.

It is respectfully submitted that in the interests of substantial justice a rehearing of this matter should be granted.

We pray for rehearing, and reversal of the judgments below and an order directing the court below to dismiss the proceedings.

Dated, September 6, 1949.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Appellants.

LEO R. FRIEDMAN,

WILLIAM B. ACTON,

Of Counsel.



CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for appellants and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is in good faith and not interposed for delay.

Dated, San Francisco,
September 6, 1949.

MORRIS LAVINE,
*Counsel for Appellants
and Petitioners.*

